

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

7 GLORIA SCOTT AND *
8 DEANIA JACKSON, *
9 * NO. 96-8461
10 VERSUS * DIVISION "I"
11 * SECTION 14
12 THE AMERICAN TOBACCO *
13 COMPANY, INC., ET AL. *

17 Transcript of proceedings before the
18 Honorable Richard J. Ganucheau, Judge Pro Tempore,
19 Civil District Court, Parish of Orleans, State of
20 Louisiana, 421 Loyola Avenue, New Orleans, Louisiana
21 70112, commencing on June 18, 2001.

27 * * * * *
28 Thursday Morning Session
29 April 10, 2003
30 10:00 a.m.
31 * * * * *

I N D E X

2 Witness Page
3 W. KIP VISCUSI, Ph.D.
Voir Dire (By Mr. Russ Herman) 18496

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31
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18492

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18494

1 Thursday Morning Session

2 April 10, 2003

3 10:00 a.m.

4 * * * * *

5 P R O C E E D I N G S

6 * * * * *

7 (In open court without a jury
8 present:)

9 THE COURT:

10 It's my understanding that counsel
11 for defendants wish to place some matter
12 on the record before the jury is brought
13 into the courtroom.

14 Mr. Wittmann?

15 MR. WITTMANN:

16 Yes, Your Honor.

17 We wanted to place on the record our
18 objection to counsel for plaintiffs
19 identifying any of the law firms involved
20 in the defense side of this case with the
21 surveys that are referred to by this
22 witness in his examination and having
23 counsel identified by name.

24 And we wanted to make an objection on
25 the record so that any reference to those
26 surveys would be as they were yesterday,
27 just sort of references to the lawyers for
28 the tobacco companies that engaged this
29 witness to work on the surveys.

30 We object to the use of the specific
31 law firm names.

32 THE COURT:

18495

1 It's my understanding that the survey
2 that was funded by attorneys was the one

3 done in 1985, if I remember correctly from
4 our conference in chambers, and that
5 counsel for plaintiffs do not intend to
6 name any individual lawyers.

7 Do you agree with that, Mr. Herman?

8 MR. RUSS HERMAN:

9 Yes.

10 Also the 1997 survey the witness
11 mentioned also has the names of the law
12 firms on it.

13 THE COURT:

14 All right. And I opined during the
15 conference and I now take the position
16 that that is not so fraught with potential
17 prejudice that it should be excluded.

18 If it's in the document, it's in the
19 document and it's a fact. I don't think
20 the 403 prejudice objection is such that
21 it outweighs the probative effect of the
22 jury's having knowledge of prior
23 engagements of this expert.

24 MR. WITTMANN:

25 Thank you, Your Honor.

26 THE COURT:

27 Are we ready to bring the jury in?

28 MR. MUEHLBERGER:

29 Your Honor, just briefly.

30 I made a mistake yesterday and
31 referenced Professor Viscusi's book
32 Smoking: Making a Risky Decision as
18496

1 SA-2547. It's actually 2555.

2 THE COURT:

3 All right. Bring the jurors in the
4 courtroom.

5 (In open court with a jury present:)

6 THE COURT:

7 Good morning. Have a seat.

8 We ended yesterday with the direct on
9 qualifications and tender of Professor
10 Viscusi as an expert.

11 It's now time for cross on
12 qualifications by plaintiffs counsel. Are
13 you ready to proceed?

14 MR. RUSS HERMAN:

15 Just one second. I'm not -- thank
16 you, I appreciate it.

17 MR. RUSS HERMAN:

18 Good morning, Judge Ganuchau. Good
19 morning, staff, learned counsel. Good
20 morning, ladies and gentlemen of the jury.

21 -- -- --

22 W. KIP VISCUSI, Ph.D.

23 being previously duly sworn by the Clerk, testifies
24 and says further as follows:

25 -- -- --

26 VOIR DIRE EXAMINATION

27 BY MR. RUSS HERMAN:

28 Q. Good morning, Dr. Viscusi. My name is
29 Russ Herman, I'm a lawyer from New Orleans.

30 A. Good morning, Mr. Herman.

31 Q. Thank you.

32 You have testified on qualifications

1 yesterday.

2 You have testified that you are No. 7 I think
3 in the world or the United States in economic
4 writings. I congratulate you for that, and I am
5 going to be questioning you about that.

6 You testified that you are No. 10 in the
7 United States or in the world in being quoted. I'm
8 going to ask you about that.

9 You testified that you teach at Harvard. I'm
10 going to ask you about that, some of your
11 teachings.

12 MR. MUEHLBERGER:

13 Your Honor --

14 MR. WITTMANN:

15 Could we get to a question, Your
16 Honor, please?

17 THE COURT:

18 Ask the witness a question,

19 Mr. Herman, please.

20 MR. RUSS HERMAN:

21 Sure.

22 BY MR. RUSS HERMAN:

23 Q. Have you in connection with your testimony
24 reviewed the trial transcript?

25 A. For the entire trial, no.

26 Q. You haven't reviewed Dr. Burns' testimony,
27 have you?

28 A. No, I have not.

29 Q. Have you reviewed Dr. Jaffe's testimony on
30 conspiracy?

31 A. No, I have not.

32 Q. Have you reviewed Dr. Cummings' testimony?

18498

1 MR. WITTMANN:

2 Objection, Your Honor.

3 Qualifications?

4 THE COURT:

5 Overruled.

6 A. Yes.

7 Q. Okay. Have you reviewed Dr. Benowitz's
8 testimony?

9 A. Briefly, yes. I believe so.

10 Q. When?

11 A. Maybe I didn't. Maybe I did -- I did

12 Dr. Arnett, Dr. Cummings.

13 Q. Well, we know you did Dr. Arnett.

14 A. Yes.

15 Q. Dr. Henningfield, did you review that?

16 A. No.

17 Q. Did you review the president of
18 Philip Morris' video that the jury has seen, of
19 Bible?

20 A. No.

21 Q. Did you review the video of the president of
22 Lorillard, Mr. Orlowsky's deposition that the jury
23 has seen?

24 A. No.

25 Q. Have you reviewed the Tamol deposition, a
26 former Philip Morris employee that the jury has seen?

27 A. No.

28 Q. Did you review the Spears deposition video --

29 A. No.

30 Q. -- that the jury has seen?
31 He is the -- I think he was the president at
32 one time of RJR.

18499

1 Have you reviewed --
2 MR. MUEHLBERGER:
3 Objection, misstates the record.
4 MR. WITTMANN:
5 It misstates the record. He was not
6 the president of RJR.
7 MR. RUSS HERMAN:
8 Who is he with? Brown & Williamson,
9 RJR?
10 BY MR. RUSS HERMAN:
11 Q. At any rate, you didn't see it, did you, sir?
12 A. No.
13 Q. Have you reviewed Dr. Farone's testimony, a
14 former Philip Morris employee, that the jury has
15 seen?
16 A. No.
17 Q. Have you reviewed the Schneider (sic),
18 Gravely or Newton videos that the jury has seen?
19 A. No.
20 Q. Have you reviewed the Morgan deposition and
21 the Colby deposition that the jury has seen?
22 A. No.
23 Q. Have you seen the Chilcote videos that this
24 jury has seen?
25 A. No.
26 Q. Have you reviewed Dr. Lavie's, a New Orleans
27 physician, heart doctor, testimony?
28 A. No.
29 Q. Have you reviewed Dr. Sartor's testimony?
30 A. No.
31 Q. Have you reviewed Dr. Emory's testimony?
32 A. No.

18500

1 Q. Have you reviewed the testimony of the class
2 reps that the jury has seen?
3 A. Not the trial testimony.
4 Q. Have you reviewed Dr. LeBlanc's trial
5 testimony that the jury was present at?
6 A. No.
7 Q. Now, there have been approximately four
8 hundred to five hundred exhibits, many of them from
9 company -- tobacco cigarette company records or the
10 Tobacco Institute records.
11 Have you reviewed the evidence that the jury
12 has seen in this case?
13 A. I don't know if any of those overlap with my
14 exhibits, but I have not made any attempt to review
15 company documents, for example.
16 Q. They don't overlap with yours.
17 A. Then I haven't reviewed them.
18 Q. Have you reviewed the maybe 150 to 200
19 documents the defendants have shown the jury?
20 A. No.
21 Q. Now, would you agree that the number of books
22 or articles someone writes is not determinative,
23 it's the quality of the substance?
24 A. Quality and quantity both matter.
25 Q. Well, the most read and bought books in the
26 world are the Old Testament and New Testament;

27 correct?
28 A. I believe so, yes.
29 Q. Would you agree that the substance of what
30 someone writes is more important than how many
31 articles they write?
32 A. I think both matter. In fact, unless you
18501
1 have a high publication rate, you don't get tenure,
2 even if you write one good article.
3 Q. Right. Universities require you to write so
4 that you can stay on the faculty and get tenured;
5 correct?
6 A. I have been tenured for twenty years, so I
7 don't have to keep on writing.
8 Q. I see, okay.
9 A. Twenty-four years actually.
10 Q. So it would be fair for me, if you say you
11 are the most -- 10th most quoted or the 7th, you
12 have written all this stuff, to ask you about some
13 things you have written for this jury, wouldn't it?
14 Wouldn't that be fair?
15 A. It's fine to ask me about what I have
16 written.
17 Q. Good.
18 MR. RUSS HERMAN:
19 0318.04.
20 BY MR. RUSS HERMAN:
21 Q. Your book, recognize it?
22 A. I was one of the co-authors of the book, yes.
23 Q. Okay. Quote -- see if you remember this
24 quote. This is your words, co-author:
25 Jurors fall substantially short of what one
26 might hope for --
27 MR. MUEHLBERGER:
28 Objection.
29 BY MR. RUSS HERMAN:
30 Q. -- in terms of a desired pattern of
31 decisions --
32 MR. MUEHLBERGER:
18502
1 Objection.
2 BY MR. RUSS HERMAN:
3 Q. -- particularly in small probability, large
4 loss cases, end quote.
5 MR. MUEHLBERGER:
6 May we approach?
7 THE COURT:
8 Just a moment. I have an objection.
9 You may approach, if you would like to.
10 MR. RUSS HERMAN:
11 You go up.
12 (At sidebar:)
13 MR. MUEHLBERGER:
14 Your Honor, this --
15 THE COURT:
16 Your objection?
17 MR. MUEHLBERGER:
18 Your Honor, this has nothing to do
19 with qualifications. And it's from a book
20 that deals with punitive damages, which is
21 obviously not relevant here.
22 THE COURT:
23 Well, is it one of the books that he

24 named yesterday?
25 MR. MUEHLBERGER:
26 No.
27 THE COURT:
28 But he identified that it's his book.
29 MR. MUEHLBERGER:
30 Well, he wrote it.
31 THE COURT:
32 Okay.

18503

1 MR. BENCOMO:
2 If I may respond, Judge?
3 Mr. Muehlberger yesterday, taking the
4 gentleman through his qualifications,
5 cited seven different books.
6 Now, if he's going to attempt to show
7 what this man has done, we are actually
8 entitled to prove what else he has done.
9 He cannot pick and choose from the
10 universe of the books that he has written
11 those available to him, and this jury is
12 entitled to see what this man has said in
13 his writings, regardless of what he has
14 said.
15 THE COURT:
16 The objection is overruled. I'm
17 going to instruct him to answer the
18 question.
19 MR. MUEHLBERGER:
20 Thank you, Your Honor.
21 (In open court:)
22 THE COURT:
23 The objection is overruled. Answer
24 the question, if you are able to.
25 A. That's not an opinion. That's a scientific
26 conclusion based on analysis of over four hundred
27 jury responses in a controlled experiment that that
28 chapter is reporting on.
29 Q. You wrote this, didn't you?
30 A. I wrote it. I just told you what it is.
31 Q. Okay. And you have written before that
32 juries aren't rational, they can't make decisions.

18504

1 Haven't you written that a number of times?
2 A. In the controlled experiments I analyzed. I
3 never said juries can't make decisions.
4 This pertains to punitive damages experiments
5 that I have run with jurors.
6 Q. Well, you, sir, are not a formal jury
7 consultant, and you have never been recognized as
8 one; isn't that true?
9 A. I have never sought to be a jury consultant.
10 Q. Sir, is that a yes or a no?
11 A. I have never been a jury consultant. Is that
12 your question?
13 Q. Yeah, yeah, sure.
14 On your curriculum -- excuse me, on the
15 report you submitted for this case -- and I would
16 like to give you a copy of it. You could take
17 mine. It will take me a little while to find it. I
18 have even tabbed it; okay?
19 THE COURT:
20 I have one that we can give to him,

21 if you like?
22 MR. RUSS HERMAN:
23 Thank you, Judge. Thank you very
24 much.
25 THE COURT:
26 This is your report, is it not, sir?
27 THE WITNESS:
28 Yes, it is, Your Honor.
29 THE COURT:
30 All right.
31 BY MR. RUSS HERMAN:
32 Q. Now, you identified at page twenty -- would
18505
1 you turn to page twenty, please?
2 A. My pages stop after page 15.
3 Q. Well, let me hand you mine.
4 A. Then they are not numbered after that.
5 Q. Well, I have got one that's got everything
6 that you submitted.
7 A. There are more pages, they are just --
8 Q. I will turn to page twenty for you.
9 MR. SHOLES:
10 Excuse me, Your Honor, can we see
11 what it is so we can compare and make sure
12 we are on the same page?
13 MR. RUSS HERMAN:
14 It was the report that was actually
15 submitted to me, including all of his
16 reliance documents and his writings.
17 MR. SHOLES:
18 May we approach the witness just to
19 make sure we are on the same page, Judge?
20 THE COURT:
21 Yes.
22 MR. RUSS HERMAN:
23 Sure.
24 BY MR. RUSS HERMAN:
25 Q. Doctor, while they are doing that, do you
26 remember compiling that list?
27 A. Yes. This is my bibliography.
28 Q. Things that you have written. It was
29 furnished with your report; correct?
30 A. Yes.
31 THE COURT:
32 Mr. Muehlberger, that is Mr. Herman's
18506
1 copy. Why don't you give that back to
2 him. The witness has a copy and I have a
3 copy.
4 MR. RUSS HERMAN:
5 Thank you. Thank you,
6 Mr. Muehlberger.
7 BY MR. RUSS HERMAN:
8 Q. Now, at page twenty, No. 197, you have listed
9 an article. Let's see if I read the title right.
10 Check it with me. Quote: What Jury's Can't Do
11 Well. The Jury's Performance as a Risk Manager.
12 Did you write that article?
13 A. I wrote it with Reid Hastie.
14 Q. Okay. Turn to page five.
15 Well, let me ask you, did you write this or
16 did he write this under your name? Quote:
17 Juries hate scientific evidence.

18 They think they won't be able to
19 understand it, so naturally they can't
20 understand it. As soon as you step into
21 the box, you see a curtain of obstinate
22 incomprehension clanging down over their
23 minds.

24 Did you write that?

25 MR. GAY:

26 Objection, volume and no
27 qualifications.

28 MR. WILLIAMS:

29 Objection.

30 THE COURT:

31 You may approach the bench, if you
32 like.

18507

1 Mr. Herman, your volume needs to be
2 moderated.

3 MR. RUSS HERMAN:

4 I will moderate it. I'm a little
5 hard of hearing in this ear, and I'm
6 excited.

7 THE COURT:

8 Calm down, Mr. Herman.

9 THE WITNESS:

10 Well, I didn't write that.

11 THE COURT:

12 Just a moment, please. I have an
13 objection. I need to hear the objection,
14 and then I will instruct you whether you
15 should answer the question or not.

16 (At sidebar:)

17 MR. GAY:

18 Your Honor, this is so far afield of
19 qualifications that it is just
20 ridiculous.

21 If he wants to question him on his
22 qualifications for what he was tendered,
23 this is the time to do it.

24 This is not the time to do this kind
25 of theatrics.

26 THE COURT:

27 Well, it's a bit theatrical, and I
28 have admonished Mr. Herman not to be
29 theatrical.

30 But I think the jury has a right to
31 know what the plaintiffs bring out in this
32 man's past performance and work history.

18508

1 I think it's relevant to
2 qualifications and it's relevant to
3 credibility. That's part of what they
4 were doing.

5 Your objection is overruled.

6 MR. BENCOMO:

7 Thank you, Judge.

8 MR. WILLIAMS:

9 Your Honor told Mr. Herman to calm
10 down, but I think Mr. Herman should be
11 censured before this jury.

12 His antics are unacceptable and
13 improper. He's jumping around smiling in
14 the jurors' faces. If anyone else would

15 do that, Your Honor would censure them.
16 And I would ask Mr. Herman be censured for
17 that.
18 THE COURT:
19 I note your comments and I decline.
20 I think he will listen to my instructions.
21 MR. BENCOMO:
22 Thank you.
23 (In open court:)
24 THE COURT:
25 The objection is overruled. Do you
26 remember the question?
27 THE WITNESS:
28 I do.
29 I didn't write that passage.
30 Conceivably a co-author did. But I didn't
31 write it, I don't recall it.
32 BY MR. RUSS HERMAN:

18509

1 Q. It's got your name on it, doesn't it?
2 A. You have to show me the article.
3 MR. RUSS HERMAN:
4 Mr. Bencomo, show him the article,
5 would you, please? Thank you. Thank you,
6 Raul?
7 MR. BENCOMO:
8 May I approach?
9 THE COURT:
10 Yes, Your Honor.
11 MR. BENCOMO:
12 Thank you.
13 BY MR. RUSS HERMAN:
14 Q. Would you like some water?
15 A. That would be great.
16 MR. RUSS HERMAN:
17 Regina, would you mind bringing the
18 gentleman some water?
19 A. Yeah, this is the article.
20 Q. You have got your name on it, don't you?
21 A. That's true.
22 Q. Okay. You put it in your CV for this case,
23 didn't you?
24 A. I believe some of it is a quote that we
25 didn't write.
26 Q. But you never footnoted that you didn't write
27 it?
28 A. Well, Footnote 12 --
29 Q. Did you footnote that you didn't write it,
30 sir?
31 A. Yeah. Well, the second part: I'm afraid you
32 will have to explain yourself more simply,

18510

1 Mr. Middlemas. The jury and I haven't got a higher
2 degree in mathematics, you know.
3 So it's referring to other publications that
4 are in quotations and it says Footnote 12.
5 Q. Sir, did you footnote what I just read?
6 A. No. But it continues.
7 Q. Thank you.
8 MR. WITTMANN:
9 Your Honor, can the witness finish
10 his answer, please?
11 MR. RUSS HERMAN:

12 He's already explained it.
13 THE COURT:
14 Have you finished your answer, sir?
15 THE WITNESS:
16 No, Your Honor.
17 THE COURT:
18 If not, you may finish your answer.
19 A. We are talking about the next passage for
20 which we did provide an exact quotation and
21 reference for what we were saying, and it's not us.
22 We are referring to somebody else in Footnote 12.
23 Q. So your answer is no, you didn't footnote
24 what I read to the jury?
25 A. There is no footnote on the sentences you
26 read.
27 Q. Now, what's the definition of
28 incomprehensible? Let me quote these words:
29 Obstinate incomprehension with reference to the
30 jury.
31 What's the definition of incomprehension?
32 A. Unable to comprehend.

18511

1 Q. Well, that's a question to me, and I'm going
2 to answer it. No, the dictionary says having a slow
3 or inadequate mental grasp.
4 Now, would you look at the jury. Do they
5 look incomprehensible?
6 MR. GAY:
7 Objection, Your Honor.
8 MR. WITTMANN:
9 Objection, Your Honor.
10 THE COURT:
11 Sustained. The jury will disregard
12 that comment.
13 Approach the bench, gentlemen.
14 (At sidebar:)
15 MR. RUSS HERMAN:
16 I will go on to another subject.
17 MR. WITTMANN:
18 Mr. Herman seems to be trying to
19 create a mistrial.
20 THE COURT:
21 Mr. Herman, I think you have passed
22 the bounds of propriety on qualifications
23 as an expert.
24 You gave some testimony when you gave
25 the definition. That's inappropriate.
26 Don't do it anymore. You are flirting
27 with a mistrial.
28 MR. RUSS HERMAN:
29 Yes, sir.
30 THE COURT:
31 Be careful.
32 Mr. Williams wants to say something.

18512

1 Mr. Herman, if you want to hear it, you
2 need to approach.
3 MR. WILLIAMS:
4 Your Honor, this is the second or
5 third time this has happened. I ask that
6 Mr. Herman be censured in front of the
7 jury because he did it in front of the
8 jury.

9 THE COURT:
10 Denied.
11 (In open court:)
12 MR. RUSS HERMAN:
13 I'm not going to answer any more of
14 your questions, okay. You will do the
15 testifying. That's what I've been
16 instructed.
17 MR. SHOLES:
18 Your Honor, I must object to the
19 editorializing.
20 THE COURT:
21 Mr. Herman, ask the witness
22 questions, if you have questions of the
23 witness, please.
24 MR. RUSS HERMAN:
25 Yes.
26 BY MR. RUSS HERMAN:
27 Q. I'm going to move on to another subject. I
28 think the next subject that I would like to discuss
29 with you is -- have you written and given interviews
30 in which you said that when people die of smoking-
31 related diseases, there is a benefit because they
32 can't collect or don't collect their Social Security

18513

1 or Medicare?
2 A. I have never said that because smoking kills
3 people, that that's a good thing.
4 What I have done is calculate the financial
5 costs of smoking to society, and I have been on Dan
6 Rather, 20/20 and other shows discussing my
7 calculations.
8 Q. Let's deal with that, then. In a 1995 study,
9 Mr. Viscusi, did you indicate in your conclusion
10 that: It's true smokers incur heavy healthcare
11 costs while they are alive, but as a class they more
12 than make up for that by dying relatively young?

13 MR. WITTMANN:
14 Objection, Your Honor.

15 MR. GAY:
16 Objection, Your Honor.

17 THE COURT:
18 Do you wish to approach the bench?

19 MR. WITTMANN:
20 Yes, sir.

21 THE COURT:
22 Approach the bench.

23 (At sidebar:)

24 MR. WITTMANN:
25 The question is not directed toward
26 the witness' qualifications, Your Honor.

27 MR. GAY:
28 I have an additional one.
29 If he's allowed to do this on
30 qualifications cross, he has got to show
31 the witness the statement so the witness
32 can respond with some context.

18514

1 I mean, he's just reading something
2 out of something.

3 MR. WITTMANN:

4 Our objection is that it doesn't go
5 to the witness' qualifications. Whatever

6 his opinions are are his opinions. His
7 qualifications in the field as tendered
8 are what we are supposed to be examining
9 him on.
10 THE COURT:
11 I understand that. But the jury is
12 entitled to know what he's done in the
13 past to form an opinion on his
14 credibility. That's part of
15 qualifications.
16 Mr. Wittmann, your objection is
17 overruled.
18 I think it's appropriate that the
19 question incorporate the reference that he
20 has being asked about so at least the
21 defense counsel will have an opportunity
22 to look at it.
23 MR. BENCOMO:
24 We will do that.
25 THE COURT:
26 Thank you, Judge.
27 (In open court:)
28 THE COURT:
29 The objection is overruled. Answer
30 the question if you are able to, and here
31 is the question:
32 In a 1995 study, Mr. Viscusi, did you

18515

1 indicate in your conclusions that: It's
2 true smokers incur heavy healthcare costs
3 while they are alive, but as a class they
4 more than make up for that by dying
5 relatively young?
6 A. I don't recall the exact words, but I have
7 written in a number of places that on balance,
8 smokers do not constitute a net financial drain on
9 society because, although they have higher health
10 costs when they are young, they have lower Medicare
11 and Social Security costs because of their premature
12 mortality, and on balance is not a net financial
13 cost.
14 Q. As an economist, do you recognize for the
15 jury that when somebody earns a living, their Social
16 Security and their Medicaid comes out of their
17 paycheck and their employer's paycheck and goes into
18 a fund? In other words, that's a benefit even a
19 smoker has earned during their life, isn't it?

20 MR. GAY:
21 Objection. Beyond the scope of
22 qualification.
23 THE COURT:
24 Overruled. Answer the question, if
25 you are able to.
26 Shall I read it back?

27 THE WITNESS:
28 I can handle this one, Your Honor.
29 A. Everybody is entitled to contribute to Social
30 Security, and as long as they live they are entitled
31 to receive benefits.
32 Q. You are not an epidemiologist, are you?

18516

1 A. No, I am not.
2 Q. Your methodology has been criticized by

3 epidemiologists with the American Cancer Society;
4 isn't that correct?
5 A. I have never seen my methodology criticized
6 by anybody.
7 Q. Okay.
8 A. At least this methodology.
9 Q. Well, let's look at Exhibit 0321.04.
10 0321.04. This is from Dr. Heath, vice president
11 epidemiology and surveillance research of the
12 American Cancer Society, and Michael J. Thun, M.D.,
13 director of analytic epidemiology, American Cancer
14 Society. And I will quote --

15 MR. WITTMANN:

16 Objection, Your Honor. Is this
17 exhibit in evidence?

18 MR. GAY:

19 Objection, Your Honor. The witness
20 is entitled to see it.

21 MR. RUSS HERMAN:

22 Sure.

23 MR. MUEHLBERGER:

24 Your Honor, may we approach?

25 THE COURT:

26 Yes.

27 (At sidebar:)

28 MR. WITTMANN:

29 Mr. Herman is about to start reading
30 from a document that's not in evidence,
31 hasn't been authenticated. We don't know
32 what the heck it is. That's why I raise

18517

1 the objection.

2 And I think it's improper for him to
3 start asking the witness questions reading
4 from some document that's not even in
5 evidence.

6 MR. BENCOMO:

7 Judge, my response to that is that
8 the witness has just testified that his
9 methodology has never been questioned, and
10 we have the right then to challenge that
11 statement by this witness.

12 MR. MUEHLBERGER:

13 This is hearsay. What's your
14 exception to the hearsay rule?

15 MR. BENCOMO:

16 We can certainly ask him if he is
17 aware of this particular statement --

18 THE COURT:

19 You have to authenticate this, and I
20 don't think it's been authenticated. It's
21 not a statement under oath, it's not a
22 prior inconsistent statement. It's
23 hearsay.

24 It's got to be authenticated. It's
25 objected to.

26 MR. BENCOMO:

27 I will ask Mr. Herman to lay the
28 predicate. Thank you, Your Honor.

29 (In open court:)

30 THE COURT:

31 The objection is sustained.

32 Mr. Herman?

1 BY MR. RUSS HERMAN:

2 Q. Okay. You indicated I believe you never have
3 seen any criticism of your methodology? Isn't that
4 what you said?

5 A. Of that paper is what we are talking about,
6 the 1995 paper.

7 Q. I would like to go back in your testimony,
8 because I thought I heard you say that you had never
9 seen any criticism of your methodology anywhere.

10 A. Well, I thought you were referring to the
11 paper and what we just discussed about Social
12 Security benefits, Medicare, that issue.

13 Q. Oh, so you have seen criticism of you for
14 that methodology, haven't you?

15 A. I haven't seen any criticism for how I did
16 those calculations.

17 Q. Okay.

18 MR. RUSS HERMAN:

19 Could we go back? Could you screen
20 back for me. I would like to see the
21 witness' answer immediately before the
22 bench conference. And then you can
23 explain.

24 I apologize to you. I may have
25 misheard. That's why I want to be
26 absolutely accurate.

27 THE COURT REPORTER:

28 Do you want me to read it, Your
29 Honor?

30 MR. RUSS HERMAN:

31 That's okay.

32 I'm so bad at these things. If you

18519

1 would just help me, I would appreciate it.

2 BY MR. RUSS HERMAN:

3 Q. Here it is. Here was the question I had
4 asked:

5 Your methodology has been
6 criticized by epidemiologists with the
7 American Cancer Society; isn't that
8 correct?

9 Your answer: I have never seen
10 my methodology criticized by anybody.
11 Do you recall giving that answer?

12 A. Yes. And the American Cancer Society
13 quotation I assume refers to my 1995 study.

14 Q. All right. Well, let me ask you about your
15 methodology, criticisms of your methodology. I seem
16 to have lost an exhibit. I will have to find it.
17 Just give me a moment.

18 I had the Harvard study. Oh, here it is,
19 Exhibit 0330.04.

20 But before I ask you about it, you teach at
21 the Harvard Law School?

22 A. I do.

23 Q. The Harvard Law Review is ranked as the
24 number one law review in the country, is it not?

25 A. It's a student edited law review. I'm not
26 sure if it's number one or not.

27 Q. Sir, okay --

28 A. I'm not sure of its ranking. It's a good
29 one.

30 Q. Yes, sir. Well, of course, you teach there,
31 and I agree with you.

32 Sir, when you say it's a student publication,
18520

1 isn't it true that only the best students at the
2 entire Harvard Law School are selected to write for
3 the Harvard Law Review?

4 A. Well, not necessarily. It's a mixture of the
5 best students in terms of grades as well as a
6 writing competition. So many of the best students
7 don't do it.

8 But they are good students generally.

9 Q. The most excellent students write for law
10 review journals, don't they?

11 MR. WITTMANN:

12 Object to the relevance of the Law
13 Review for this witness' qualifications.

14 THE COURT:

15 Overruled. Answer the question, if
16 you are able to.

17 A. Some of my better students have worked on the
18 Law Review, yes.

19 Q. And the Law Review is reviewed by a panel of
20 the top students in the law school, is it not?

21 A. It's reviewed by a panel of students, yes.
22 As I said, they are good students.

23 Q. They are the top students, aren't they? Now
24 let's be fair.

25 A. They are among the top, but some of the very
26 top don't get on the Law Review or choose not to get
27 on the Law Review.

28 Q. Now, the Law Review is then monitored and
29 mentored by professors, faculty professors; isn't
30 that true?

31 A. You are wrong. It's completely independent.
32 There is no monitoring of the Law Review either by

18521

1 the professors or by the dean. They are an
2 independent organization. They are financially
3 independent as well.

4 Q. So they can make independent judgments; isn't
5 that correct?

6 A. They make independent judgments irrespective
7 of any peer review or faculty oversight.

8 Q. Well, peer means people of your own level and
9 expertise independently reviewing your work; isn't
10 that true?

11 A. That's right. Professors, not students.

12 Q. And professors that object to law review
13 articles have the right to criticize those law
14 review articles; isn't that true?

15 A. Not in the Law Review. We don't have a right
16 to appear in the Law Review to criticize them.

17 Q. I didn't say that. I said if a professor
18 objects to a peer reviewed Law Review article at
19 Harvard, a professor has the right to object to
20 anything that's in that Law Review; correct?

21 A. Your question is incorrect. There is no such
22 thing as a peer-reviewed article in Harvard Law
23 Review. That's what you just said; right?

24 Q. All right. Is every citation and quotation
25 in a Law Review article at the Harvard Law Review
26 checked and double-checked for accuracy?

27 A. Students check these things. Most often they
28 don't make mistakes, so it tends to be very
29 accurate.

30 Q. And as a matter of fact, you testified on
31 your qualifications to this jury that you teach at
32 the Harvard Law School students, many of whom
18522

1 participate in and publish the Law Review; correct?

2 A. Yes.

3 Q. And isn't it true in Exhibit 0330.04, the
4 Harvard Law Review of May 1999, that your
5 methodology in conducting surveys and your work for
6 the tobacco companies is subject to severe
7 criticism?

8 MR. WITTMANN:

9 Objection, Your Honor.

10 THE COURT:

11 Overruled. Answer the question, if
12 you are able to.

13 A. Yeah. This is an article by a plaintiffs'
14 expert who Judge Weinstein concluded had no veracity
15 when he testified. So he's not a Ph.D., he's not
16 qualified to evaluate my methodology.

17 Q. Sir, I'm just asking the questions.

18 A. A lawyer disagreed with me, yes. But he has
19 no qualifications. They have no qualifications to
20 evaluate surveys.

21 Q. Nevertheless, the Harvard Law Review at 112
22 Harvard Law Review 1420 published this criticism of
23 your methodology; isn't that true?

24 A. They published the article, yes.

25 Q. Did you read the article?

26 A. I didn't read it before it was published. I
27 have read it since.

28 Q. Okay. Did you write, or can you show me a
29 single writing that you did since you have listed a
30 number of things in which you personally attacked
31 the criticism of you in this article either to the
32 editors of the Harvard Law Review or the faculty of
18523

1 the Harvard Law Review?

2 A. There is no faculty of the Harvard Law
3 Review. We have a faculty at the Harvard Law
4 School.

5 But I never wrote anything to the Law Review
6 where I responded or -- I did respond to their
7 comments in my book, Smoke-Filled Rooms, which
8 Mr. Muehlberger had yesterday.

9 Q. Right. And so to be fair, we need to look at
10 actually what the criticism of your methodology is.

11 Do you have that exhibit in front of you,
12 sir?

13 A. No, I don't.

14 Q. Okay.

15 MR. RUSS HERMAN:

16 Could we get Exhibit 0330.04?

17 MR. MUEHLBERGER:

18 Your Honor, may we approach?

19 THE COURT:

20 Yes.

21 (At sidebar:)

22 THE COURT:

23 Do I need the exhibit?

24 MR. MUEHLBERGER:
25 No.
26 THE COURT:
27 Okay.
28 MR. MUEHLBERGER:
29 The objection is hearsay. This is
30 not peer reviewed, it's not a learned
31 treatise. It's pure hearsay.
32 THE COURT:

18524

1 You are saying the Harvard Law Review
2 is not a learned treatise?
3 MR. MUEHLBERGER:
4 Sir, it's not peer reviewed. There
5 has been no testimony that it's a learned
6 treatise any more so than the Gonzaga Law
7 Review.
8 I mean, there has been no testimony
9 establishing this as a learned treatise.
10 It's not peer reviewed. It's a law school
11 student publication.
12 THE COURT:
13 Well, I think it's peer reviewed
14 because the witness said that the students
15 review it and they research it. I think
16 it's peer reviewed.
17 It's not been identified as a learned
18 treatise at this point.
19 MR. BENCOMO:
20 Judge, if I may, just to add to this,
21 he also testified that, number one, he's
22 familiar with the article, he recognizes
23 it. He has written about it in his book
24 Smoke-Filled Rooms or whatever it is.
25 As Your Honor also well indicated,
26 that the editorial board and others have
27 read all of these articles before they are
28 published for accuracy and what have you.
29 THE COURT:
30 It's peer reviewed.
31 MR. BENCOMO:
32 But on the issue of hearsay, he has

18525

1 already acknowledged that he's familiar
2 with the article and that he responded to
3 it in a book that he's published that
4 Mr. Muehlberger is going to use in order
5 to ask him questions about it.
6 Unless Mr. Muehlberger doesn't want
7 to ask him any questions that deal with
8 anything in the book Smoke-Filled Rooms or
9 any issues that arise as a result of that,
10 if he wants to waive any questions along
11 those lines, then we will consider --
12 THE COURT:
13 Do you dispute the witness' statement
14 that he responded to the criticism in his
15 book?
16 MR. MUEHLBERGER:
17 I can't say one way or the other,
18 Your Honor. I haven't looked at it for
19 that purpose. I presume he's accurate.
20 But my point is, just for the record,

21 that peer review under the learned
22 treatise exception to the hearsay rule
23 does not include students looking at other
24 students' work. I don't think so.

25 THE COURT:

26 Well, isn't a peer an equal? A
27 doctor reviews a doctor and a student
28 reviews a student?

29 MR. MUEHLBERGER:

30 For purposes of a dictionary
31 definition, but not for purposes of a
32 learned treatise exception to the hearsay
18526

1 rule.

2 THE COURT:

3 Do you have a citation for that?

4 MR. MUEHLBERGER:

5 No, I don't, Your Honor.

6 MR. WILLIAMS:

7 803.18, Your Honor, is learned
8 treatise.

9 THE COURT:

10 Thank you.

11 MR. BENCOMO:

12 803.18.

13 He did testify it is reliable.

14 THE COURT:

15 I'm going to take judicial notice of
16 the fact that the Harvard Law Review is a
17 learned treatise on the subject of the
18 science or art of law in the United
19 States.

20 MR. BENCOMO:

21 Thank you, Your Honor.

22 THE COURT:

23 Having referenced Article 803.18,
24 hearsay exception for learned treatises.

25 So your objection is overruled.

26 MR. MUEHLBERGER:

27 Thank you.

28 MR. BENCOMO:

29 Thank you, Judge.

30 (In open court:)

31 THE COURT:

32 The objection is overruled.
18527

1 Mr. Herman, I don't have the question
2 before me.

3 MR. RUSS HERMAN:

4 I was about to ask it.

5 THE COURT:

6 And it's --

7 MR. RUSS HERMAN:

8 I was about to ask it.

9 THE COURT:

10 If you haven't asked it, please ask
11 it. If you have asked it, please repeat
12 it.

13 MR. RUSS HERMAN:

14 Sure.

15 BY MR. RUSS HERMAN:

16 Q. Do you have your Harvard Law Review in front
17 of you?

18 A. I do.
19 Q. It's dated May 1999; is that correct?
20 A. Yes.
21 Q. And it says, the title of it is Taking
22 Behaviorisms Seriously: Some Evidence of Market
23 Manipulation?
24 A. That's right.
25 Q. Turn, if you would, to page 52. Now, let me
26 know when you have it.
27 A. I have got it.
28 Q. Yesterday in stating qualifications,
29 Mr. Muehlberger asked you, didn't he, if you were
30 going to talk about surveys and risk perception?
31 A. Yes.
32 Q. Okay. Let's go to page 52 at the bottom, and
18528

1 see what these authors say.

2 See if I read it right:

3 Asking the wrong question. The
4 preceding critique suggests that the
5 questions used by Viscusi and the industry
6 appear to have been designed in ways that
7 produced the appearance of overestimation
8 in consumers' perceptions of the risk of
9 smoking.

10 Here we argue that in addition to
11 asking their survey questions wrong, the
12 tobacco survey designers also asked wrong
13 questions.

14 This is in addition to designing
15 survey questions in a manner likely to
16 generate exaggerated or overestimated
17 responses.

18 Viscusi and the industry also ask the
19 types of questions that were unlikely to
20 produce any meaningful response at all,
21 regardless of the questions' tendencies to
22 lead to overestimated responses.

23 Did I read that correctly?

24 A. Yes, you did.

25 Q. Do you consider that a criticism of your
26 methodology?

27 A. I disagree with it because it has no
28 scientific content.

29 Q. Sir --

30 A. It's certainly a criticism.

31 Q. Okay. Let's go to page 53. Do you see the
32 paragraph marked (B), sir?

18529

1 A. Yes.

2 Q. Quote: The dangerous illusion of
3 precision. Mindful of the preceding
4 considerations, it's illuminating to
5 return to Viscusi's data. Although
6 Viscusi claims that he has measured
7 consumer risk assessments with a
8 quantitative, meaningful, well-defined
9 probabilistic metrix, this precision is
10 likely illusory.

11 Did I read that correctly, sir?

12 A. Yes, did you.

13 Q. Is that a criticism of your methods, sir?

14 A. I think he doesn't like me, yes.

15 Q. Sir, I don't like you or dislike you. I'm
16 just going to ask questions.
17 MR. GAY:
18 Objection.
19 THE COURT:
20 Wait. That objection is overruled.
21 But Mr. Herman, please don't make any
22 comments. This is a question and answer
23 format. Ask questions, please, and when
24 you get an answer, ask another question.
25 MR. RUSS HERMAN:
26 Sure. I will do that, Judge.
27 BY MR. RUSS HERMAN:
28 Q. What's illusory mean or illusion?
29 A. It's not really there.
30 Q. Something that's not really there.
31 Have the tobacco companies that brought you
32 here shared with you the document about the illusion
18530
1 of filtration which is in evidence here?
2 A. No.
3 Q. Now, let's go to page 55 of the Harvard Law
4 Review. When you have it, let me know, sir.
5 A. I'm there.
6 Q. If you would go down to the paragraph that
7 says "Another problem." It's about -- it's the
8 third full paragraph.
9 Do you see it, sir?
10 A. I have it.
11 Q. Quote: Another problem with Viscusi's
12 interpretation of his survey evidence is
13 that it presents at best a still shot of
14 consumer perceptions when one needs a
15 motion picture.
16 Our discussion of a possibility of
17 manufacturer manipulation as well as our
18 review of history of marketing practices
19 from the tobacco industry demonstrates
20 that consumer risk perceptions are subject
21 to a dynamic process of market
22 manipulation. Period, end quote.
23 Did I read that correctly, sir?
24 A. Yes, you did.
25 Q. Is it a criticism of your methodology?
26 A. Looking at one survey, which is what they
27 did, gives you a still shot, which is what they
28 referred to.
29 I will give the jury the motion picture that
30 these authors want by looking at multiple surveys.
31 Q. Is it a criticism of your methodology, sir?
32 A. It's an invalid criticism, yes.
18531
1 Q. Okay. Did the companies that brought you
2 here share with you the documents on manipulation of
3 nicotine that have been used as evidence in this
4 case?
5 A. No.
6 Q. Did they share with you the marketing surveys
7 and advertising surveys that have been done of young
8 people ages 12 to 16 from 1960 through 1980?
9 A. No.
10 Q. Did they share with you the document the jury
11 has seen -- excuse me, that's been offered in

12 evidence about tobacco companies who brought you
13 here finding psychological crutches for smokers?
14 A. No.
15 Q. Did they share with you a document the jury
16 has seen and it's in evidence that says that --
17 strike that. I will show that document later.
18 Let's go on with the criticisms. Page 56,
19 sir.
20 A. I have it.
21 Q. Do you see the first full paragraph, sir?
22 A. "Again"?
23 Q. That begins "However."
24 A. "However"?
25 Q. Do you see the last sentence, sir?
26 A. "In essence"?
27 Q. In essence, Viscusi adopts a conflicted
28 view of the smoking question. He argues
29 that, quote, enormously powerful, end
30 quote, market forces can produce a safer
31 cigarette, but he does not recognize that
32 those same powerful forces can manipulate

18532

1 consumers. End quote.
2 Is that a critique of your methodology, sir?
3 A. Well, it's not a methodological critique, but
4 it's a disagreement with what I have written.
5 Q. All right. In the same article, since you
6 have read it, don't the authors find that you
7 underestimated advertising expenditures by the
8 industry two to one?
9 A. I don't recall that.
10 Q. Well, I'm not allowed -- I am not going to
11 read you the figure, but I will refer you to page
12 39.

13 Are you at page 39?

14 A. I am.

15 MR. WILLIAMS:

16 Your Honor, may we approach?

17 MR. RUSS HERMAN:

18 I'm not going to use the amount.

19 THE COURT:

20 You may approach.

21 (At sidebar:)

22 MR. WILLIAMS:

23 We have been over this issue before.

24 Your Honor has said that this sort of
25 evidence, the amount is inadmissible.

26 Mr. Herman has twice in front of the
27 jury said I can't talk about the amount,
28 and so he's implying that he can't talk
29 about the amount, which is improper given
30 Your Honor's ruling.

31 And Your Honor warned about that a
32 couple of weeks ago.

18533

1 MR. BENCOMO:

2 Judge, if I may, one of the reasons
3 why Mr. Herman is saying what he is saying
4 is because he's trying to be ultra-
5 cautious and does not want the witness,
6 who may not have been cautioned by his own
7 counsel, not to disclose the amount.
8 That's why he's saying that.

9 MR. MUEHLBERGER:
10 I assure you we have cautioned the
11 witness as to all the Court's motion in
12 limine rulings. So we appreciate your
13 concern, but it's not necessary.
14 THE COURT:
15 Does he know that we are not going to
16 talk about advertising dollars?
17 MR. MUEHLBERGER:
18 Yes.
19 THE COURT:
20 All right.
21 MR. WILLIAMS:
22 So Mr. Herman has twice referred to
23 the jury that I can't talk about the
24 amount, and so they start thinking about
25 the amount. So that's improper.
26 MR. BENCOMO:
27 You know, he's not clairvoyant,
28 Judge. He doesn't know what this jury is
29 thinking.
30 THE COURT:
31 The reason that I ruled it was off
32 base is the vast disproportionate comparison

18534

1 between research on health issues and safe
2 cigarette issues versus the amount on
3 advertising. It's so totally out of
4 proportion I thought it would be
5 prejudicial to the defendants, and that's
6 the reason I ruled it inadmissible, if you
7 recall.

8 MR. WILLIAMS:
9 I do.

10 THE COURT:
11 For him just to indicate that he
12 can't talk about the amounts I don't think
13 gets the jury anywhere near that
14 consideration because they don't know that
15 there is a vast difference.

16 And as long as he doesn't imply that
17 or say it, I don't think he violates my
18 rule.

19 The objection is overruled.

20 MR. MUEHLBERGER:
21 Your Honor, one other issue, I'm
22 sorry.

23 Plaintiffs filed a late Daubert
24 motion, which they then withdrew because
25 it was late. And what Mr. Herman has been
26 doing here with methodology is a Daubert
27 hearing.

28 Now, you didn't allow me to do a
29 Daubert hearing in front of this jury on
30 Arnett even though we had timely filed
31 one.

32 I object to them being allowed to do

18535

1 a Daubert hearing on methodology when it
2 is late, it shouldn't be here, and it
3 certainly shouldn't be done in front of
4 the jury.

5 THE COURT:

6 Well, I think it may be getting close
7 to that, and you might want to caution
8 Mr. Herman that if it treads on the
9 Daubert issues, that is, methodology and
10 criticism and acceptance by his peers, I
11 am going to stop him.

12 MR. BENCOMO:

13 Well, how about this? It's five
14 minutes to eleven, and if Your Honor
15 wishes to break at this point --

16 THE COURT:

17 Yeah, we will take our midmorning
18 recess at this point.

19 MR. BENCOMO:

20 Thank you very much.

21 (In open court:)

22 THE COURT:

23 We are going to take our midmorning
24 recess at this point for fifteen minutes
25 by the wall clock until ten after the
26 hour.

27 (In open court without a jury
28 present:)

29 THE COURT:

30 Let the record reflect the jury has
31 left the courtroom.

32 Anything for the record by plaintiffs
18536

1 counsel?

2 MR. RUSS HERMAN:

3 No, Your Honor.

4 I understand your direction and I
5 will follow it.

6 THE COURT:

7 Anything for the record by defense
8 counsel?

9 MR. WITTMANN:

10 Yes, Your Honor.

11 I want to review exactly what
12 Mr. Herman said when he pointed to the
13 jury and asked the witness to look at this
14 jury and talk about whether he thought
15 they were incompetent. And I want to
16 review it during the break, because I
17 think that may well be grounds for a
18 mistrial. I want to look at it first and
19 see exactly what was said.

20 MR. RUSS HERMAN:

21 I didn't say incompetent, sir.

22 MR. WITTMANN:

23 That's why I want to see exactly what
24 you said.

25 THE COURT:

26 Anything else for the record by
27 defense counsel?

28 MR. LONG:

29 Yes, Your Honor. I have something
30 for the record.

31 In terms of the Law Review article
32 that Mr. Herman keeps reading from, I move
18537

1 that the questions and the answers
2 regarding that article be stricken, or in

3 the least the jury be instructed that the
4 article is in no way to be taken for the
5 truth of what it asserts.

6 The article is written by a lawyer
7 named Jon Hanson. It's a scientific
8 criticism of sorts, but the author Hanson
9 has absolutely no credentials.

10 Now, I saw what Your Honor said in
11 the record about the Harvard Law Review.
12 The Harvard Law Review is a law review.
13 It is not a scientific journal. It's not
14 a journal of economics.

15 This article was never reviewed by
16 anybody, peer reviewed by anybody with
17 qualifications in the area of economics,
18 statistics, risk assessment, anything
19 else.

20 When you allow Mr. Herman to read
21 from this, in effect he's allowing the
22 jury to hear what appears to be expert
23 testimony from a guy who is not an
24 expert. And as the witness pointed out,
25 Jon Hanson has testified in one tobacco
26 case, and Judge Weinstein found him to
27 lack credibility and qualifications.

28 So I think it's very improper to
29 allow Mr. Herman to read portions of
30 criticisms from a nonexpert simply because
31 students accepted it for publication in
32 their journal, albeit the Harvard Law

18538

1 Review.

2 THE COURT:

3 I will allow of course redirect on
4 qualifications, and I think it's
5 appropriate if you wish to bring that
6 out.

7 I made the ruling, and I think it's
8 correct when I made it.

9 Anything else by defense counsel for
10 the record?

11 A reply is not necessary,
12 Mr. Herman. We will recess until ten
13 after the hour.

14 MR. RUSS HERMAN:

15 So Your Honor knows, Professor Hanson
16 is of the Harvard Law School. He's a
17 professor, and it's used for impeachment.

18 THE COURT:

19 We will recess until ten after.

20 (A recess is taken at 11:02 a.m.)

21 -- -- --

22 (In open court without a jury present
23 at 11:11 a.m.):

24 THE COURT:

25 Mr. Wittmann wanted to put something
26 on the record before the jury comes into
27 the courtroom.

28 Mr. Wittmann, you have the floor.

29 MR. WITTMANN:

30 Thank you, Your Honor.

31 Before the break, Mr. Herman was
32 questioning Dr. Viscusi with respect to an

1 article in the Harvard Law Review.

2 And as Your Honor well knows,
3 Mr. Herman is a fine trial lawyer. He
4 knows what he's doing. He knows that
5 questions to a witness on the stand about
6 their attitude toward juries or toward the
7 Court are improper questions.

8 It would be improper to ask a
9 witness: Do you think juries are bad? Do
10 you like the Judge?

11 But after Your Honor had already
12 warned Mr. Herman to calm down and get it
13 in control, he asked this series of
14 questions to the witness.

15 Question: What is the definition of
16 incomprehensible?

17 Answer: Unable to comprehend.

18 Question: Well, that's a question to
19 me, and I'm going to answer it. No, the
20 dictionary says having a slow inadequate
21 mental grasp.

22 Would you look at this jury, and do
23 they look incomprehensible?

24 At which point there was an objection
25 and we stopped him and Your Honor
26 sustained the objection.

27 Mr. Herman's attempt to poison the
28 jury against this witness is inexcusable
29 in view of his experience, his ability.

30 And to pose those questions which he
31 knew were totally improper in an attempt
32 to discredit this witness warrants a

1 granting of a mistrial, Your Honor, and we
2 so move.

3 MR. RUSS HERMAN:

4 To which we object.

5 Yesterday in establishing the
6 qualifications of this witness, you listed
7 his books. The paper that I read from is
8 listed on the CV as part of his report.

9 He asked me a question; I responded
10 with a definition.

11 That's not the first time that's
12 happened in this case by defense counsel
13 or plaintiff counsel.

14 I then asked him a direct question.
15 You objected, the Judge sustained it. I
16 did not go further and I left the issue.

17 I don't think that a witness' own
18 description of juries in learned books
19 which he said are peer reviewed and
20 learned articles which he has listed in
21 connection with an expert report are
22 improper questions in order for a jury to
23 determine the witness' credibility.

24 And I also believe that defense
25 counsel has an obligation when they call a
26 witness to know what that witness has
27 written, to know what that witness
28 believes about the jury system.

29 And this witness is an obvious

30 attempt to supplant the jury with
31 himself.
32 You attempted to curry favor with
18541
1 this jury by mentioning JFK, Carter, Gore,
2 the Pope, Reagan, et cetera, et cetera,
3 none of which were issues actually in any
4 expert's report, weren't in CVs.
5 And I think the questioning was
6 correct, I didn't overstep the bounds, and
7 it certainly is not grounds for a
8 mistrial.
9 MR. WITTMANN:
10 With all due respect, Your Honor,
11 Mr. Herman tried to personalize this jury
12 and get them involved in an antagonistic
13 way with this witness.
14 THE COURT:
15 I understand.
16 Motion for mistrial is denied.
17 The jury is coming into the
18 courtroom.
19 (In open court with a jury present:)
20 THE COURT:
21 Please be seated. Recess is over.
22 Mr. Herman?
23 MR. RUSS HERMAN:
24 Yes, Your Honor.
25 THE COURT:
26 Ready to continue?
27 MR. RUSS HERMAN:
28 Yes, sir.
29 BY MR. RUSS HERMAN:
30 Q. Sir, I was asking you about the Harvard Law
31 Review, and I had asked you if it isn't true that
32 you were criticized for underestimating by 100

18542

1 percent the amount defendant cigarette companies
2 spent on advertising?
3 A. Not to my knowledge.
4 Q. Okay. Would you look at page 39. Now, I'm
5 not allowed to read the amounts.
6 MR. MUEHLBERGER:
7 Objection.
8 THE COURT:
9 Overruled.
10 MR. MUEHLBERGER:
11 Also improper Daubert.
12 THE COURT:
13 Overruled.
14 BY MR. RUSS HERMAN:
15 Q. Page 39?
16 A. I'm there.
17 Q. The paragraph that starts here.
18 A. Yes.
19 Q. Quote: Indeed with respect to one
20 component of those efforts, Viscusi notes
21 that cigarettes have long been among the
22 most highly advertised consumer products
23 with an annual advertising budget now in
24 excess of blank and a promotional budget
25 greater than blank annually.
26 Do you see that?

27 A. Yes.
28 Q. That's a criticism of your reports, is it
29 not?
30 A. No, it's not. It's just a quote out of my
31 book.
32 Q. Oh, it's a criticism of your quote out of
18543
1 your book?
2 A. No, it's not a criticism. All it does is
3 state what I said in my book.
4 Q. Well, let's look at the Footnote 488 at page
5 105. It is footnoted at Footnote 488, is it not?
6 A. That's correct.
7 Q. Well, let's read it together and make sure I
8 do this right. You have the footnote at page 105?
9 A. I do.
10 Q. Viscusi's Smoking, note 255 at 35, the FTC --
11 that's the Federal Trade Commission; correct?
12 A. Yes.
13 Q. -- cites a combined advertising and promotion
14 expenditure rate of blank for 1993.
15 Do you see that?
16 A. That's correct.
17 Q. That's 100 percent more than you reported,
18 isn't it?
19 A. No. Because mine is an advertising budget in
20 excess of a certain number, a promotional budget
21 greater than a certain number, each of which I give
22 references for as well.
23 So they are greater than those numbers. But
24 different people conclude different things as part
25 of what they call advertising, promotion and
26 marketing.
27 Q. Well, I can't ask you the amount, so I'm
28 going to do this. The amounts you wrote about are
29 X; correct?
30 A. No. In excess of --
31 Q. In excess of X?
32 A. And a promotional budget greater than Y.
18544

1 Q. In excess of --
2 A. In excess of X and greater than Y.
3 Q. And actually the FTC reports 2XY for 1993,
4 double what you said; isn't that correct?
5 A. They include 2X -- that's two times X plus
6 Y. But the scope of what they are picking up could
7 be different in terms of how marketing expenses are
8 counted.
9 And I do give references for the government
10 documents where I got my numbers.
11 Q. Sir, all I'm asking you is their figure is
12 twice what yours is on advertising, isn't it?
13 A. No.
14 Q. Okay, I will accept that. We will move on.
15 A. It's not correct.
16 Q. We will move on, it's okay.
17 Now, you indicated that Harvard Law Review
18 articles are written by law students; right?
19 A. No. The decisions to publish them are made
20 by law students and the footnotes are checked by law
21 students. But it was written by two professors.
22 Q. Oh, this Harvard Document 0330.04 is actually
23 written by two Harvard law professors, isn't it?

24 A. No. Hanson is a junior colleague of mine at
25 the law school, and Kysar is not a professor at
26 Harvard Law School.
27 Q. Well, let's look at page 66. Does it list
28 one of the authors as a professor at Harvard Law
29 School at the time that this publication was
30 submitted?
31 A. That's just what I said. One of them is, one
32 of them is not.

18545

1 Q. Okay. The other is United States District
2 Court -- I'm sorry, law clerk for Judge Young,
3 United States District Court for the District of
4 Massachusetts, B.A. Indiana University, J.D. Harvard
5 Law School?
6 A. He's a student of Professor Hanson's, that is
7 correct.
8 Q. Okay. And he also says: Participants were
9 the Law and Economics Workshop at Harvard Law School
10 for helpful comments. Is that right?
11 A. I did a debate with Professor Hanson at at
12 Law and Economics Workshop.
13 Q. Okay. And he acknowledges also that the
14 Harvard Law School Summer Research Program
15 participated; correct?
16 A. And everybody at Harvard Law School gets
17 summer research support, so you have to acknowledge
18 them when you publish it.
19 Q. So this is a publication by Harvard Law
20 School, and I'm not going to go through the whole
21 thing now; it's not necessary. But I do want to
22 offer and introduce into evidence as identified by
23 you Exhibit 0330.04.

24 THE COURT:
25 Objection?
26 MR. GAY:
27 Objection, Your Honor.
28 MR. MUEHLBERGER:
29 Objection.
30 THE COURT:
31 Overruled. It will be received in
32 evidence.

18546

1 BY MR. RUSS HERMAN:
2 Q. Now, I'm going to move on to another topic.
3 You have testified that you are going to rely
4 in part on a survey that was done in 1985; correct?
5 A. That's correct.
6 Q. And a survey that was done in 1987; correct?
7 A. Not 1987. 1997.
8 Q. '97, I'm sorry, I apologize to you. You are
9 quite correct.
10 Let's talk about the 1985 survey, SA-2534.
11 Would you like my copy?
12 MR. RUSS HERMAN:
13 May I approach, Your Honor?
14 THE COURT:
15 You may approach.
16 MR. RUSS HERMAN:
17 Here you are, sir.
18 BY MR. RUSS HERMAN:
19 Q. The 1985 survey is in front of you?
20 A. It's the survey report done on the survey.

21 Q. You have been doing work for the tobacco
22 industry ever since, haven't you?
23 A. I didn't do any work for them or lawyers
24 representing them in '85, '86. I believe the first
25 time was '87 or '88. But it has not been on a
26 continuing basis; it's been off and on.
27 Q. You have testified for tobacco companies more
28 than 15 times?
29 A. I testified for them in court six previous
30 times, but in deposition that's probably an accurate
31 count.
32 Q. And you --

18547

1 MR. MUEHLBERGER:
2 That exhibit number you gave is not
3 what you said it was.
4 MR. RUSS HERMAN:
5 That's what I got from the exhibit
6 list. If you give me the right number, I
7 will be happy to put it on there.
8 MR. MUEHLBERGER:
9 Well, you are doing the cross. I
10 need your number.
11 MR. RUSS HERMAN:
12 Okay, counsel, you don't have --
13 don't give me the number.
14 SA-2534.
15 THE WITNESS:
16 That's what it says on this.
17 MR. RUSS HERMAN:
18 Okay. Is that the right number? Is
19 that the right number? Because if it
20 is -- I stand corrected if I gave the
21 wrong number.
22 THE COURT:
23 What are we discussing?
24 MR. RUSS HERMAN:
25 The 1985 survey report.
26 THE COURT:
27 I don't have that. I don't know the
28 number.
29 THE WITNESS:
30 Somebody wrote 2534 on there.
31 MR. RUSS HERMAN:
32 I did. It's my note. I may have

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1 been in error. I thought that's how it
2 was identified.
3 MR. MUEHLBERGER:
4 I'm sorry, SA-2534?
5 MR. RUSS HERMAN:
6 Is that what I have on there?
7 THE WITNESS:
8 Yes.
9 BY MR. RUSS HERMAN:
10 Q. We are all on the same page. It's the 1985
11 survey report; correct?
12 A. That's correct.
13 Q. Now, I want you to review for us your first
14 employment in the cigarette companies. Excuse me,
15 let me ask the question. Here is the rest of the
16 question: Was that for R. J. Reynolds Tobacco
17 Company?

18 A. It was for a law firm representing R. J.
19 Reynolds Tobacco Company.
20 Q. And what law firm was that? Just the name of
21 the firm, not the lawyers.
22 MR. WITTMANN:
23 Objection, Your Honor. May we
24 approach?
25 THE COURT:
26 You may approach.
27 (At sidebar:)
28 MR. WITTMANN:
29 We renew our objection to naming the
30 law firms involved in this case. We renew
31 it again.
32 THE COURT:

18549

1 Overruled for the reasons I stated in
2 chambers.
3 MR. MUEHLBERGER:
4 May we have a continuing objection,
5 Your Honor?
6 MR. WITTMANN:
7 May we have a continuing objection?
8 MR. BENCOMO:
9 We have no problem with that.
10 THE COURT:
11 Yes.
12 (In open court:)
13 THE COURT:
14 The objection is overruled. The
15 question to you is as follows: And what
16 law firm was that? Just the name of the
17 firm, not the lawyers.
18 You may answer the question, please.
19 A. Jones Day Reavis & Pogue.
20 Q. Jones Day Reavis & Pogue was representing the
21 cigarette company R. J. Reynolds at the time?
22 A. That's correct, and other clients.
23 Q. Okay. And you understood at the time that
24 the R. J. Reynolds Company was a cigarette company
25 that manufactured cigarettes such as Winston, Salem
26 and Camel?
27 A. That's correct.
28 Q. And you went to the Jones Day offices in
29 Cleveland, Ohio; is that correct?
30 A. I did.
31 Q. And they said, Here are some file drawers.
32 Why don't you go through them?

18550

1 A. Well, I think that may have been on a second
2 meeting. I came into an office, and they had file
3 drawers of articles that they had amassed regarding
4 hazard warnings, and they wanted me to take a look
5 at them and evaluate them and tell them what the
6 world at large in the academic world had to say
7 about hazard warnings.
8 Q. So you went through these file drawers;
9 correct?
10 A. That's correct.
11 Q. And you found some materials in these file
12 drawers; correct?
13 A. I found articles, plus I found this report.
14 Q. And you did brainstorming at that time with

15 them; correct?
16 A. I was there to provide insight as to what
17 academic researchers were doing on hazard warnings.
18 Q. Sir --
19 A. But I did not do litigation-related
20 brainstorming. So I didn't talk about any cases.
21 Q. Sir, did you testify in the Blankenship case
22 in deposition that you did -- you were brainstorming
23 with the lawyers at the Jones Day firm?
24 A. I may have used that term, but it refers to
25 discussing academic research. It had nothing --
26 well, no specific cases came up.
27 Q. The Jones Day law firm, was it your
28 understanding that that law firm or R. J. Reynolds
29 had paid in whole or part for the 1985 survey upon
30 which you shall base some of your testimony today?
31 A. Yes, I did understand that.
32 Q. And there was another law firm published on
18551

1 the cover; correct?
2 A. Two more law firms.
3 Q. All right. And I'm not allowed, other than
4 to ask you this question -- and don't give me the
5 names of the lawyers, please.
6 Was the Shook Hardy law firm of Kansas City,
7 Missouri, also listed on the face of that report?
8 A. Shook Hardy is here. They don't say it's the
9 Kansas City branch, but Shook Hardy is listed.
10 Q. Have you ever been to Shook Hardy's offices
11 in Kansas City?
12 A. I have.
13 Q. So you know that they represent other tobacco
14 companies other than RJR; correct?
15 A. That's correct, as well as other clients.
16 Q. And sir, do you know that in this trial,
17 Jones Day's lawyers from Cleveland and Shook Hardy's
18 lawyers from Kansas City have been participating in
19 this case?

20 MR. WITTMANN:
21 Objection, Your Honor.
22 THE COURT:
23 Overruled. Answer the question, if
24 you are able to.
25 A. I know some Shook Hardy lawyers from Kansas
26 City. I have never asked the Jones Day lawyer -- or
27 the R. J. Reynolds lawyer whether he's a Jones Day
28 lawyer or where he's from. So I don't know that
29 Jones Day is here.
30 Q. Okay. Are you familiar with the jury
31 questionnaire that was filled out in this case where
32 the Jones Day firm and the Shook Hardy firms were
18552

1 listed as law firms that might be participating in
2 this case?
3 MR. GAY:
4 Objection. Your Honor.
5 THE COURT:
6 Overruled. Answer the question, if
7 you are able to.
8 A. I have never seen the jury questionnaire. I
9 don't know anything about it.
10 Q. The 1997 survey that you intend to base part
11 of your opinion on, do you have that --

12 A. I don't have that.
13 Q. You can have my copy.
14 My exhibit number on this is exhibit for the
15 record SA-2539. And I am going to --
16 MR. RUSS HERMAN:
17 May I approach, Your Honor?
18 THE COURT:
19 Yes.
20 BY MR. RUSS HERMAN:
21 Q. And if you would just keep both of these in
22 front of you. Thank you, sir.
23 Sir, isn't it true that the 1997 survey that
24 you intend to base your testimony on is paid for and
25 commissioned by the cigarette law firms Jones Day
26 and Shook Hardy?
27 MR. GAY:
28 Objection. Asked and answered
29 twice.
30 THE COURT:
31 Overruled. Answer the question, if
32 you are able to.

18553

1 MR. RUSS HERMAN:
2 It's a different survey.
3 A. It's a different survey. And the '97 survey
4 was not commissioned by Shook Hardy. It was
5 commissioned by Jones Day and another law firm, not
6 Shook Hardy.
7 Q. Okay. The law books that you -- those law
8 firms, were they representing the cigarette
9 companies?
10 A. Yes, among other clients. But, yes, they do
11 represent cigarette companies.
12 Q. These are three books which were shown to you
13 yesterday.
14 MR. RUSS HERMAN:
15 May I approach, Your Honor?
16 THE COURT:
17 Yes.
18 BY MR. RUSS HERMAN:
19 Q. The first is Fatal Tradoffs. You wrote this
20 book, sir?
21 A. I did.
22 Q. Would you look at the last cover, and tell me
23 from whose library it came?
24 A. Shook Hardy & Bacon Library, Tobacco Library.
25 Q. The next book I want to show you, this is a
26 book you identified yesterday?
27 A. That's correct.
28 Q. What's the name of it?
29 A. Rational Risk Policy.
30 Q. Would you look at the last -- tell me whose
31 library it came from?
32 A. Same place, Shook Hardy & Bacon Library.

18554

1 Q. The third book, you showed the jury
2 yesterday?
3 A. Informational Approaches to Regulation, also
4 came from the Shook Hardy & Bacon Library.
5 Q. Would you show the jury the inside cover
6 where they can see the Shook Hardy Library?
7 A. Right there.
8 Q. Did that come from Kansas City, those books?

9 A. I believe so.
10 Q. And who brought them here?
11 A. One of the attorneys or his assistant.
12 Q. You didn't bring them, did you?
13 A. Not these books. One of the books I brought.
14 Q. Now, the 1985 survey, what's the number on
15 it?
16 A. SA-2534.
17 Q. That was actually prepared to be used in
18 lawsuits, wasn't it?
19 A. "In Anticipation of Litigation" they say.
20 Q. So they got you there, you went through their
21 drawers, you found the survey, and that was done,
22 and you brainstormed at the time without any
23 particular case in mind, and you based your
24 testimony in part in a number of trials based on
25 that 1985 survey that was prepared for litigation;
26 is that correct?
27 A. I met with them a couple of years after the
28 survey had been done. It was prepared in
29 anticipation of a case in which they decided not to
30 use the survey, and I dug it out of the files and
31 analyzed the data back there in the 1980s.
32 Q. Are you familiar with how -- didn't you see

18555

1 the papers of how that survey came about, that it
2 was suggested by R. J. Reynolds lawyers in the '60s?
3 A. I think, first of all, that's incorrect.
4 Q. Okay.

MR. MUEHLBERGER:

Your Honor, may we approach?

THE COURT:

You may approach.

(At sidebar:)

MR. MUEHLBERGER:

Mr. Herman is now quoting from a
document that the Special Master sustained
a claim of privilege on. It's Plaintiffs'
Exhibit 268. It's an Arnold & Porter
memorandum, 1964.

THE COURT:

Is that true?

MR. BENCOMO:

Judge, I'm going to have to have
Mr. Herman discuss that point because I
was on another point. I do apologize to
the Court on that issue. I'm going to
have to ask him to come up here.

(In open court:)

MR. RUSS HERMAN:

I withdraw the question.

My question to you has been ruled out
of order, so don't answer it.

BY MR. RUSS HERMAN:

Q. Isn't it a fact that in deposition, you have
testified, quote, the industry is a big group?
A. Excuse me, I didn't hear you.

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Q. I'm sorry. Isn't it true that you have
testified in deposition, quote:
The industry is a big group. I
mean, it includes all the law firms,
includes all of the companies, includes

6 all of the groups such as the Tobacco
7 Institute.
8 Did you testify to that?
9 A. I was trying to clarify what the questioner
10 meant by tobacco industry in that deposition, if you
11 look at the previous questions.
12 Q. Sir, I'm just going to ask you, now that you
13 explained, for a yes or no. You have testified that
14 the tobacco industry includes its law firms, all of
15 the companies, and all groups such as the Tobacco
16 Institute; correct?
17 MR. GAY:
18 Objection. May we approach, Your
19 Honor?
20 THE COURT:
21 You may approach.
22 (At sidebar:)
23 MR. GAY:
24 Two objections, Your Honor.
25 The first is the proper way to use a
26 deposition is to ask a witness a
27 question. If the witness says something
28 different, the deposition can then be used
29 to either impeach or refresh the witness'
30 recollection.
31 Mr. Herman goes right to the
32 deposition, reads something out of it, and
18557
1 then starts asking the witness questions
2 about it. That's number one.
3 Number two, what in the world does
4 this have to do with this man's
5 qualifications? Nothing.
6 MR. BENCOMO:
7 Two comments about that.
8 The first objection of Mr. Gay's I
9 believe was cured by Mr. Herman's second
10 question to the witness: Have you not
11 previously testified. And then he went on
12 to quote from what in essence is page 41,
13 lines five through seven. That's number
14 one.
15 Number two, what this has to do with
16 the man's qualifications goes to interest,
17 bias and prejudice. Because that's who he
18 is working for, he recognizes it,
19 acknowledges it, and the books he's
20 involved with, the ones they have quoted
21 from have been written in anticipation of
22 litigation. He's part of the industry.
23 MR. GAY:
24 Bias is something for major cross,
25 Judge, not qualifications. He is either
26 qualified in areas or he's not. We are so
27 far afield on this.
28 THE COURT:
29 Doesn't bias have something to do
30 with qualifications?
31 MR. GAY:
32 Bias is what you ask on your main
18558
1 cross.
2 THE COURT:

3 The objection is overruled.
4 MR. MUEHLBERGER:
5 In follow-up to their attempted use
6 of Plaintiffs' Exhibit 268, which they had
7 to know was privileged, it's in the box
8 they were going to use for Viscusi, we
9 just discovered that.
10 So number one, if they had been
11 timely, we might have found it out.
12 Number two, I would ask them to check
13 and make sure that any exhibit they want
14 to use with these witnesses has not been
15 found to be privileged.
16 And third, the problem with quoting
17 from documents without identifying it and
18 asking if that's true, he may be
19 testifying about a privileged document for
20 all we know without an identification of a
21 deposition or document prior to the
22 question.
23 MR. BENCOMO:
24 Two observations about that.
25 Number one, Mr. Herman retracted that
26 once I explained to him that that was
27 something Dominic had ruled out.
28 The second thing is which way do they
29 want it? Do they want us to quote from a
30 document such as Mr. Herman attempted to
31 do from a deposition and identify it as
32 such, or do they want us not to do that?

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1 But I understand your objection, and
2 during the lunch hour we will resolve any
3 of those issues.
4 MR. MUEHLBERGER:
5 I would just like Mr. Herman to
6 follow the rules, ask the witness a
7 question, if he's going to impeach,
8 identify the transcript and then attempt
9 to do it.
10 (In open court:)
11 THE COURT:
12 The objection is overruled, and I
13 instruct you to answer the question, if
14 you are able to.
15 Do you remember the question?
16 THE WITNESS:
17 No, Your Honor.
18 THE COURT:
19 Here is the question:
20 Sir, I'm just going to ask you now,
21 as you explained it, for a yes or no. You
22 have testified that the tobacco industry
23 includes its law firms, all of the
24 companies and all groups such as the
25 Tobacco Institute; correct?
26 A. If I have said that, that's incorrect.
27 What I said in that deposition was intended
28 to clarify the question that was being presented to
29 me.
30 So the tobacco industry does not own, for
31 example, Jones Day Reavis & Pogue. They are law
32 firms representing the tobacco industry, and I was

1 trying to figure out what the questioner in the
2 deposition was asking.

3 Q. I'm just going to approach -- if I may, Your
4 Honor -- with page 43 of your deposition, and I will
5 ask you to read question and answer at page -- I'm
6 sorry, at page 41.

7 MR. MUEHLBERGER:
8 What deposition?

9 MR. RUSS HERMAN:
10 I'm going to put a box around it, and
11 you can read the question in total and the
12 answer.

13 THE COURT:
14 Mr. Herman, Mr. Muehlberger has asked
15 what deposition. Would you please give
16 him the date and the place of the
17 deposition, if you are able to.

18 MR. RUSS HERMAN:
19 Yes, I will, Your Honor.
20 Mr. Muehlberger, it's the testimony
21 given in deposition by Dr. W. Kip Viscusi
22 in the Circuit Court of Ohio for West
23 Virginia on July 6th, 2001, at page 41.

24 And if you would like me to wait a
25 second until you get it, I will be happy
26 to do that.

27 MR. MUEHLBERGER:
28 Thank you.

29 MR. RUSS HERMAN:
30 You are welcome.

31 MR. MUEHLBERGER:
32 I am there.

1 BY MR. RUSS HERMAN:

2 Q. I'm not going to insult you by asking
3 questions about whether you were under oath or not.
4 I just want you to look at this.

5 A. Do you have page 40 so I can see the context
6 of the question? Could I see page 40 as well?

7 Q. Sure. Absolutely.

8 A. Well, the previous questions all referred to
9 the law firms representing the tobacco industry. So
10 it's unclear to me whether this question was
11 referring to the tobacco companies or the law firms
12 representing them, which is what the entirety of
13 page 40 is dealing with.

14 So the industry didn't run this survey.
15 That's why I was trying to make clear, did they mean
16 the industry or did they mean the law firms
17 representing the industry.

18 Q. Sir, if you would look at 41?

19 A. I have got it.

20 Q. Good. Now that you have said what you wanted
21 to say, I would like you, if you would, to answer my
22 question. Would you please read to the jury the
23 question at 41 and your answer?

24 A. Do you know whether any surveys had been done
25 prior to this one by the industry?

26 Well, this survey was not done by the
27 industry, by the way. So the answer --

28 Q. Sir, I'm going to ask the Court to instruct
29 you to read the words exactly as they are.

30 A. Q. Do you know whether any surveys have
31 been done prior to this one by the
32 industry?

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1 A. The industry is a big group. I mean,
2 it includes all the law firms, includes
3 all the companies, includes all the groups
4 such as the Tobacco Institute. So I don't
5 know which of those entities have
6 undertaken surveys.

7 Q. Thank you.

8 MR. RUSS HERMAN:

9 Carl, I need you to put something up.
10 May I approach the witness, Your
11 Honor?

12 THE COURT:

13 Yes.

14 MR. RUSS HERMAN:

15 The two surveys, may I see those two
16 surveys for just a second?

17 Carl, would you put up the first page
18 of SA-2534, the September 1985 survey, on
19 the Judge's screen and counsel's only.

20 And Your Honor, I would like to
21 approach.

22 THE COURT:

23 You may approach.

24 (At sidebar:)

25 THE COURT:

26 That's not the exhibit.

27 MR. RUSS HERMAN:

28 That's the deposition --

29 THE COURT:

30 No, that's a different exhibit.

31 That's a different survey.

32 MR. RUSS HERMAN:

18563

1 No, I have them both. I have them
2 both in front of me.

3 What I wanted to point out before I
4 did this, that both these surveys have
5 Arnold & Porter on them as well as Jones
6 Day.

7 I would like to ask him a question if
8 Arnold & Porter are in this case, or how
9 do you want me to handle this?

10 MR. GAY:

11 What's the relevance of that, Judge?
12 It's no relevance to anything.

13 MR. RUSS HERMAN:

14 Well, I think it has because --

15 THE COURT:

16 It's a question of whether it goes up
17 as it appears or not, and I haven't
18 solicited objections to this exhibit,
19 which is the one on my screen.

20 And as I understand your question,
21 you want to ask him if Arnold & Porter is
22 in this case?

23 MR. RUSS HERMAN:

24 I want to ask him if these are the
25 two surveys he's identified he's relying
26 on, to put up the first page. But I

27 didn't want to do anything without
28 alerting you and defense counsel as to
29 what's on the cover.

30 THE COURT:

31 Any problem with him putting up the
32 first page of this?

18564

1 MR. GAY:

2 Well, other than the objection we
3 have already made about this being way far
4 afield of qualifications.

5 THE COURT:

6 Well, these are his documents.

7 MR. GAY:

8 No. This is a survey that he
9 testified was done before he ever got
10 involved in the cases.

11 MR. RUSS HERMAN:

12 This is the -- these are two of the
13 four surveys. These are two of the four
14 surveys in his report that he says he
15 relies on.

16 MR. GAY:

17 Oh, I don't have any questions about
18 that. That's for cross, Judge. This is
19 on qualifications.

20 MR. MUEHLBERGER:

21 Just for the record, again, we object
22 to the law firm names.

23 THE COURT:

24 Mr. Muehlberger, I didn't hear what
25 you just said. Mr. Herman?

26 MR. RUSS HERMAN:

27 Yes, sir.

28 THE COURT:

29 State that again, please.

30 MR. MUEHLBERGER:

31 Just for the record, we object again
32 to the law firm names.

18565

1 MR. LONG:

2 I just wanted to say for the record
3 that I'm going to make a motion for
4 mistrial on the break, and we may be
5 getting near another one.

6 When we had discussion in chambers
7 this morning, I said the real risk of
8 getting into these law firms is
9 identifying people involved in the trial
10 with those law firms in an attempt to
11 impugn their integrity, and that's
12 happened.

13 Mr. Herman wasn't content to get
14 Shook Hardy in, he had to ask weren't they
15 involved in this case.

16 He had to bring up the Kansas City
17 thing. Your Honor has identified me at
18 least once as being from Kansas City in
19 front of the jury.

20 If he starts asking about these other
21 firms, in or out, it has got no relevance
22 whether these firms are in this case.

23 MR. RUSS HERMAN:

24 I'm not asking those questions.
25 MR. LONG:
26 You have already asked those
27 questions, for the record.
28 MR. RUSS HERMAN:
29 Wait a minute. I need to make my
30 position.
31 We discussed this in chambers,
32 discussed it on the record, and I have not

18566

1 mentioned a single lawyer in this case,
2 and I don't intend to.
3 MR. LONG:
4 You have identified the fact there
5 are lawyers in this case from Shook Hardy
6 & Bacon in particular. It's an improper
7 attempt to impugn integrity.
8 THE COURT:
9 It's on the record. You are going to
10 ask to display the first page.
11 (In open court:)
12 MR. RUSS HERMAN:
13 Carl, the first page of the 1985
14 survey, SA-2534, Defense Exhibit SA-2534?
15 THE COURT:
16 Do you wish to publish?
17 MR. RUSS HERMAN:
18 I do wish to publish, Your Honor.
19 THE COURT:
20 You may publish it.
21 MR. RUSS HERMAN:
22 Thank you, Your Honor.
23 Carl, could you blow up just the
24 written material in the center.

25 BY MR. RUSS HERMAN:
26 Q. Is this one of the surveys you are going to
27 base your opinion on as stated by you yesterday,
28 sir?
29 A. Yes.
30 Q. And it shows who it was prepared by, and "In
31 Anticipation of Litigation"; correct?
32 A. That is correct.

18567

1 Q. Okay.
2 MR. RUSS HERMAN:
3 In connection with the testimony of
4 the witness, I want to offer SA-2534, Your
5 Honor.
6 THE COURT:
7 Objection?
8 MR. MUEHLBERGER:
9 Stand on the previously made record.
10 THE COURT:
11 Approach the bench, please.
12 MR. RUSS HERMAN:
13 I would like to now put up the first
14 page.
15 THE COURT:
16 Just a moment, Mr. Herman. Approach
17 the bench, please.
18 (At sidebar:)
19 THE COURT:
20 I have an objection to the offer of

21 SA-2534 in evidence.
22 MR. MUEHLBERGER:
23 Your Honor, all I wanted to do was
24 preserve the record on this point. I
25 think it's a very serious point about
26 demonstrating the law firm names. We will
27 be moving for a mistrial, I believe.
28 MR. BENCOMO:
29 Your Honor, he already made an
30 objection and made it a continuing
31 objection --
32 MR. MUEHLBERGER:

18568

1 I'm just making my record.
2 THE COURT:
3 I didn't understand why you were
4 doing it again. It was introduced as a
5 defense exhibit, is it not? Is it not a
6 defense exhibit?
7 MR. MUEHLBERGER:
8 It was but on the defendants' exhibit
9 list, but we never sought to introduce it.
10 THE COURT:
11 Okay. The objection is overruled.
12 The exhibit will be received.
13 (In open court:)
14 MR. RUSS HERMAN:
15 Would you display for -- take this
16 down, please, Carl. Thank you.
17 And would you display for the jury --
18 I'm sorry, for the Judge and opposing
19 counsel SA-2539, a survey of February
20 1997.
21 I would like to display this for the
22 jury, Your Honor.
23 THE COURT:
24 You may publish.
25 Objection? Same objection,
26 Mr. Muehlberger, I presume?
27 MR. MUEHLBERGER:
28 Yes, Your Honor.
29 THE COURT:
30 Same ruling. You may publish.

31 BY MR. RUSS HERMAN:
32 Q. The title of this survey is Attitudes Toward
18569

1 Cigarette Smoking, and it was published February
2 1997; correct?
3 A. That's correct.
4 Q. And it bears a Defendant's Exhibit
5 No. SA-2539; correct? You can look at this one.
6 A. Yes.
7 Q. And yesterday you testified that this is
8 another survey upon which you are going to base your
9 testimony to this jury; correct?
10 A. That's right.
11 MR. RUSS HERMAN:
12 I would like to introduce SA-2539,
13 Defense Exhibit SA-2539.
14 THE COURT:
15 Same objection, I presume?
16 MR. MUEHLBERGER:
17 Yes, Your Honor.

18 THE COURT:
19 Overruled. It will be received in
20 evidence.
21 MR. RUSS HERMAN:
22 Just a few more questions and I will
23 be through with this part of the
24 interrogation, sir.
25 BY MR. RUSS HERMAN:
26 Q. What is the average age that smokers in
27 Louisiana begin to smoke?
28 A. By begin to smoke, do you mean have their
29 very first cigarette or become a regular smoker.
30 Q. Their first cigarette?
31 A. I don't know.
32 Q. There has been testimony in this trial that
18570
1 it's somewhere around 14 years old or 14 and a half
2 years old. Do you disagree with that, sir?
3 A. No, I don't.
4 Q. All right. Now, that means that youth in
5 Louisiana and the United States take their first
6 cigarette at some age younger than 14 and a half;
7 correct?
8 A. Some less, some later, that's right.
9 Q. You have testified that your testimony is
10 based in part to this jury on surveys you have
11 conducted yourself; is that correct?
12 A. In part on surveys I have run, yes.
13 Q. Tell the jury if you have ever asked young
14 men and women between the ages of 12 and 15 what the
15 health hazards or risks of cigarette smoking are?
16 A. I never asked that question.
17 Q. And in your surveys, tell these jurors,
18 please, have you ever asked in your surveys of 12,
19 13, 14, 15-year-olds what the risks are of cigarette
20 addiction?
21 A. The surveys of addiction do pick up youths.
22 I would have to check the age range. Not the
23 surveys I have run, but the surveys I have written
24 about.
25 Q. Let me repeat the question. In any surveys
26 that you yourself have run for the cigarette
27 companies, have you ever asked 12, 13, 14 or
28 15-year-olds whether they appreciate the risk of
29 cigarette smoking addiction?
30 A. Well, there is only one survey I have run for
31 them. That was the '98 survey. And the minimum age
32 was 18. So it didn't include any people in that age
18571
1 group.
2 Q. And what about the '97 survey that's now in
3 evidence? What was the age on that?
4 A. That was 18 as well.
5 Q. 18 what?
6 A. 18 as well.
7 Q. Oh, 18 and over?
8 A. 18 and over.
9 Q. Yes, sir.
10 THE COURT:
11 We will take our luncheon recess --
12 MR. RUSS HERMAN:
13 I have one question and I won't
14 delay.

15 THE COURT:
16 One question.
17 BY MR. RUSS HERMAN:
18 Q. Isn't it a fact, sir, that you have written
19 and spoken that light cigarettes are safer than
20 regular cigarettes?
21 A. Yes, and I still believe that.
22 Q. Have you read Monograph 13?
23 A. I have.
24 Q. Okay.
25 MR. RUSS HERMAN:
26 Thank you.
27 THE COURT:
28 We will take our luncheon recess
29 until 1:30.
30 (In open court without a jury
31 present:)
32 THE COURT:

18572

1 Let the record reflect the jury has
2 left the courtroom.
3 MR. RUSS HERMAN:
4 Let them make their motions. I have
5 some exhibits I prepared with Mr. Sholes
6 for Your Honor and the staff.
7 THE COURT:
8 Let the record reflect the jury has
9 left the courtroom.
10 Anything for the record by plaintiffs
11 counsel?
12 MR. RUSS HERMAN:
13 No, Your Honor.
14 THE COURT:
15 Anything for the record by defense
16 counsel?
17 MR. LONG:
18 Yes, Your Honor.
19 THE COURT:
20 Mr. Long?
21 MR. LONG:
22 I make a motion for mistrial based
23 upon plaintiffs counsel's improper attempt
24 to impugn the integrity of trial counsel
25 in this case.
26 This is an issue that has arisen
27 several times. We had a discussion in
28 chambers this morning during which I
29 expressed my view that it's one thing to
30 identify a law firm, it's another thing to
31 try to connect law firms up with trial
32 counsel in his case.

18573

1 I thought the plaintiffs said they
2 wouldn't try to do that, but I now realize
3 they were merely saying, well, technically
4 we are not going to name names.
5 But during the voir dire examination
6 of Professor Viscusi, plaintiffs counsel
7 intentionally brought out obviously the
8 names of Shook Hardy & Bacon and Jones Day
9 on the report.
10 He brought out the fact that Jones
11 Day represents Reynolds.

12 He brought the fact that Shook Hardy
13 & Bacon, although not on the document, is
14 from Kansas City.

15 Then he asked: Did you know that
16 Jones Day lawyers from Cleveland and Shook
17 Hardy & Bacon lawyers from Kansas City
18 have been participating in this case?

19 That's the link-up. That's the
20 connection.

21 Every juror knows Mr. Belasic
22 represents Reynolds. Now they have got
23 the connection.

24 Your Honor has stated on one occasion
25 that I was from Kansas City in front of
26 the jury, some comment about the weather
27 being colder in Kansas City. They have
28 got Kansas City and Shook Hardy & Bacon.

29 They have intentionally done exactly
30 what I thought they agreed not to do, they
31 have impugned the integrity of trial
32 counsel. It's totally improper, and on

18574

1 that grounds we move for a mistrial.

2 MR. RUSS HERMAN:

3 I would like to respond to that, if I
4 might?

5 THE COURT:

6 Yes.

7 MR. RUSS HERMAN:

8 I said that I wouldn't mention any
9 lawyers or direct anything ignoble to any
10 lawyers representing anybody in the case.

11 These jurors were furnished a
12 questionnaire before jury selection began
13 and for a year and a half that had Jones
14 Day and Shook Hardy's names to the jury
15 and the prospective jurors.

16 And indeed if I have to go back in
17 the record, you folks identified
18 yourselves and your firms.

19 I didn't direct a single question
20 about a lawyer in this case. You have got
21 redirect, you have got direct, you can
22 clear up if you are not part of whatever
23 this is.

24 But the fact is I didn't impugn
25 anybody. I merely pointed out how he got
26 involved in cigarette litigation, that two
27 exhibits which he testified about
28 yesterday -- he testified about them, they
29 are in his report, they are on your
30 reliance list -- list Shook Hardy and
31 Jones Day on one and Shook Hardy on the
32 other.

18575

1 It was made perfectly clear that it
2 wasn't inappropriate to refer to the firms
3 as participating in this case because,
4 number one, the jurors were already
5 voir dired and filled out questionnaires
6 about that; secondly, my report to the
7 Court was correct; third, if you can find
8 a single negative word that I said on the

9 record about any defense lawyer
10 representing cigarette companies in this
11 exam, I don't know where it is.
12 I didn't introduce the issue. If you
13 didn't want the issue introduced, you
14 should not have furnished me documents
15 with your numbers on them, you should not
16 have furnished his reliance list with
17 those documents, you should not have had
18 him refer to those documents yesterday,
19 you should not have had him refer to books
20 that were furnished from the Shook Hardy
21 Library. I'm entitled to know where they
22 came from.

23 You should not have had him in his
24 expert report say that you -- or that he
25 was going to rely on this.

26 Now, as far as Kansas City is
27 concerned, that was his testimony in
28 Blankenship. I didn't go into it in any
29 detail.

30 He's the one that said he went to
31 R. J. Reynolds lawyers, and explained that
32 it was Jones Day. I have got a right to

18576

1 ask where they reside.

2 There has been no error, no
3 prejudice, and you still have redirect.

4 MR. LONG:

5 Brief rebuttal, Your Honor?

6 THE COURT:

7 Yes, about a minute.

8 MR. LONG:

9 Obviously the Shook Hardy & Bacon
10 name was identified early in the case on
11 the jury questionnaire. That's why I have
12 said it would have been much better to
13 redact the names of law firms from
14 documents so that that issue wouldn't
15 arise.

16 But again the real damage, the real
17 danger is making the connection.

18 Mr. Herman is saying, well, I didn't
19 bring Kansas City up. Book after book,
20 this is from the Kansas City Library.
21 What possible relevance? No relevance.
22 Qualification relevance? Absolutely not.

23 Kansas City, Kansas City, Kansas
24 City. Did somebody bring that from Kansas
25 City?

26 The one intent -- it's obvious to
27 everybody in this courtroom, the one
28 intent of Mr. Herman is to prejudice the
29 jury and impugn the conduct of trial
30 counsel.

31 That's the grounds for our motion for
32 mistrial.

18577

1 MR. BELASIC:

2 Your Honor, I have got a serious
3 issue on privilege.

4 Mr. Herman read from Plaintiffs'
5 Exhibit 268, which is an Arnold & Porter

6 document which Mr. Gianna ruled was
7 protected by the attorney-client
8 privilege.

9 Your Honor, there was no appeal from
10 that, and that is now the ruling of this
11 Court.

12 Nonetheless, counsel chose to use the
13 document, he chose to read from the
14 document.

15 Even worse, he didn't identify the
16 document as Plaintiffs' Exhibit 268 so
17 that we could catch him. Luckily
18 Mr. Muehlberger is extremely familiar with
19 the record and was able to catch him
20 red-handed.

21 Now, up at sidebar Mr. Bencomo goes
22 on the record and says, well, number one,
23 when I told Russ about it, he withdrew the
24 question, as if Mr. Herman somehow isn't
25 responsible for complying with Your
26 Honor's orders on privilege.

27 Now, given this demonstrated
28 reluctance, whether it's deliberate or
29 reckless behavior or whatever, to refuse
30 to comply with this order, I would ask
31 that Your Honor order plaintiffs to check
32 the simple rulings of this Court on what

18578

1 documents are privileged, make sure that
2 they don't quote from privileged
3 documents, violate our due process rights,
4 or face the consequences.

5 It's outrageous. I should be able to
6 expect that counsel is not going to read
7 from privileged documents.

8 THE COURT:

9 I have admonished plaintiffs counsel
10 to do just what you are asking me at
11 sidebar, and I now do it publicly. Please
12 make sure you don't do that again.

13 MR. RUSS HERMAN:

14 Yes, Your Honor.

15 I want to state, I did not quote from
16 the document. And when I addressed the
17 witness, I told him that I had been ruled
18 out of order, not to answer the question
19 and went on to another question.

20 THE COURT:

21 Motion for mistrial is denied.

22 We will recess, but I want to bring
23 up an issue before we recess for you all
24 to consider.

25 I understand that counsel have
26 suggested we not work on Monday, April 21,
27 which is the Monday after Easter Sunday.
28 I have already told counsel that we have a
29 similar request from jurors.

30 My staff indicates to me that she
31 believes the jurors would be willing to
32 work on the Friday of that week, which is

18579

1 a day they are now told they are going to
2 be off, in return for working Monday --

3 for not working on Monday, having Monday
4 off.

5 Any thoughts on that? If you want to
6 tell me now, tell me now. If you want to
7 tell me before this recess ends.

8 MR. RUSS HERMAN:

9 Your Honor, Mr. Sholes and I prepared
10 exhibits for you and your staff that are
11 fundamentally important in this case. We
12 have stipulated to them outside the
13 presence of other counsel so we may have
14 objections.

15 Carl, would you -- and Regina and
16 Carl, thank you for working so hard.
17 Would you please display exhibits JF-1 and
18 JF-2?

19 THE COURT:

20 Wait a minute. I'm not finished yet,
21 Mr. Herman.

22 MR. RUSS HERMAN:

23 I'm sorry.

24 THE COURT:

25 Somehow I have the idea in my head
26 that Mr. -- or Professor Viscusi is not
27 available on Monday, the 21st; is that
28 correct.

29 MR. MUEHLBERGER:

30 That's correct.

31 MR. SHOLES:

32 That's correct.

18580

1 THE COURT:

2 That's the reason we are not going to
3 work on Monday. But from the standpoint
4 of availability of testimony on the Friday
5 of that week, would that present a problem
6 to defense counsel?

7 MR. LONG:

8 We will need to talk about it over
9 lunch break.

10 THE COURT:

11 Well, I want to get back from lunch
12 break a little early, maybe 1:20, and we
13 will confer about that issue so I will
14 have an opportunity to tell the jury after
15 we discuss it?

16 Let's go on to what Mr. Herman
17 brought up now, if that's appropriate?

18 MR. RUSS HERMAN:

19 Yes. Could we show those exhibits?

20 Mr. Sholes, you agree we
21 stipulated --

22 MR. SHOLES:

23 I agree with stipulate to these. If
24 we could display these please? May we
25 display these, Your Honor?

26 MR. LONG:

27 Judge, we can answer your question
28 now. We have conferred and we would
29 prefer not to work that Friday.

30 THE COURT:

31 So we lose a trial day.

32 MR. LONG:

1 I understand.

2 MR. LEGER:

3 The rest of us would like have this
4 shown to the jury, Judge.

5 MR. SHOLES:

6 This is our justification for not
7 working on Friday.

8 (Whereupon, the hearing adjourns at
9 12:05 p.m.)

1 REPORTER'S CERTIFICATE

2
3 I, NICHOLAS A. MARRONE, CCR, Registered
4 Merit Reporter, do hereby certify that the foregoing
5 proceedings were reported by me in shorthand and
6 transcribed under my personal direction and
7 supervision, and is a true and correct transcript,
8 to the best of my ability and understanding.

9 That I am not of counsel, not related to
10 counsel or the parties hereto, and not in any way
11 interested in the outcome of this matter.

12
13
14 _____
NICHOLAS A. MARRONE (CCR 21011)
CERTIFIED COURT REPORTER
15 REGISTERED MERIT REPORTER
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